

## FEDERAL COURT

**Court file:**

**BETWEEN.**

ASHLEY SMITH

and

FEDERAL GOVERNMENT OF CANADA

### **Notice of Constitutional Question**

*Ashley Smith* intends to question the constitutional applicability of section 91.27.

Ashley Smith intends to question the validity of the British Columbia Child and Family Development Act Division 4.

*Ashley Smith* intends to seek a remedy for a violation of sections 7-11 of the Charter of Rights and Freedoms Constitution Act 1982 based on the Crown's omission in exercising their duty of care under section 91.27.

on *(day)*, *(date)* at *(time)*, at *(place)*.

The following are the material facts giving rise to the constitutional question:

*Ashley's story:*

1. Ashley Smith is the biological mother of David Smith and James Smith.
2. Ashley has been the prime caregiver of both children from birth until November 5, 2018 when the British Columbia Family Court gave custody of both her children to Dorothy English without restriction to Andrew English the father of David Smith who Ashley Smith firmly believes has severely sexually abused both children resting on witness evidence, clinician reports, disclosure by child, videos and photo evidence.
3. Ashley Smith, mother of David Smith and James Smith, reported repeatedly to Nelson Police Services, Royal Canadian Mounted Police (police) and British Columbia Ministry of Child and Family Development (MCFD) and the British Columbia Family Court (court) that her children were abused by Andrew English father of David Smith. Police, MCFD and the court refused to regard her evidence of abuse which includes:

- a. her eye witness account of physical and psychological trauma (medically-assessed) to her children after being in the care of Andrew English
  - b. eye witness evidence of David Barron who witnessed the condition of David Smith after visits with Andrew English. Mr. Barron at the request and in the presence of Ashley Smith took photos and videos of David Smith when he came back distressed from his visits with his father Andrew English.
  - c. Report by Carmen Carter which shows in her expert opinion that James was suffering from behavioural issues resulting from previous sexual abuse.
  - d. Report by Doctor Fitzsimons which shows David Smith had been experiencing physical trauma to his foreskin.
  - e. Email from Malachy Korpi and Hanna Laaksonen Korpi which shows the odd sexualized behaviour James was experiencing before bedtime.
4. From January 2017 Ashley Smith provided play therapy, infant development, speech therapy, specialized appointments (hearing, sight) for her children because of the sexual abuse she came to believe they had experienced from Andrew English.
  5. After she came to believe her children were being sexually abused by Andrew English she fled to Ontario to protect them.
  6. She was ordered by the court to return to British Columbia. Once she returned to British Columbia she continued to seek help and report on the on going behavioural issues and altercations with Andrew English.
  7. Three Family Court hearings ensued and resulted in the following three judgments:
    - i. The first court ruling January 24, 2017 gave supervised visits of child David Smith to Andrew English through a plea.
    - ii. At the last family court ruling Andrew English made allegations that I was mentally ill and unable to care for David Smith and wanted to remove the supervision, have 100 percent of the parental responsibility and almost 50 percent of the parenting time. Court ruled to remove the supervision but left me with the parental responsibility and denied additional time. An arrangement was made to move the Monday night visit to a earlier Friday pick up.
    - iii. The third court ruling November 5, 2018 resulting in removal of both children James and David and to the custody of Dorothy English aunt of Andrew English with unrestricted access to Andrew English. This final ruling to remove the children was made without any evidence or clear allegation of harm by Ashley Smith. The British Columbia Ministry of Child and Family Development (MCFD) submitted to court an unsworn report Form A that claimed that the new

evidence she submitted (pictures and videos of trauma) may somehow pose a future risk to the children despite no evidence. However the MCFD refused to review this verified photographic and video evidence. The court also allowed the lawyer of Andrew English, Janet Connolly, who was not present at the hearing to make an unsworn statement by telephone to the court judge regarding allegations by Andrew English of my mental state. Judge Seagram's court ruling was made without regard to the sworn testimony and evidence presented to the court which is referred to in paragraph 1 above. Furthermore, Ashley Smith was not permitted by the court to respond to the unsworn statement by Andrew English's lawyer and further was refused an opportunity to cite case law that supported her position to have the children remain in her custody.

As per the above paragraph, the Family Court of British Columbia made its ruling of November, 5, 2018 the court:

- a) did not regard sworn statement and exhibits presented to that court.
- b) did regard an unsworn report MCFD that did not contain any clear statement of harm or reference to evidence;
- c) with regard to unsworn evidence testimony from a person with no standing in the case;
- d) proceeded with re-adjudicating of Judge Brown's decision made approximately a month before to give custody to Ashley Smith
- e) denied Ashley Smith an opportunity to refuse the statements made by Janet Connolly including a refusal to view the court notes from Judge Brown's decision of leaving David Smith in Ashley Smith's primary care.
- f) Denied Ashley Smith an opportunity to cite case law that support the return of children to her

3. During the Family court MCFD process described in the following, no legal rights were accorded to Ashley Smith in connection with the removal of her children by the state.

1. Section 7 Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Ashley Smith and her children were not protected from harm. The mother was traumatized by having her very young children taken and given to someone she firmly believes is sexually abusing them. And the children are traumatized by sexual abuse and separation from their mother.

Arbitrariness: The apprehension was done without warrant or evidence.

Vague: The allegations that were made without evidence were vague.

Overbreadth: Child protection is the exclusive jurisdiction of the Federal Government of Canada. The process which legally regards the constitution in these matters is the Criminal Code of Canada and the matters are to be adjudicated in a court that the jurisdiction of *Parens patriae*.

The BC Family court is not a court of *Parens patriae* and only provides limited opportunity to protect the child as they must act according to the constitutional division of powers and within their jurisdictional statutes which have created processes that do not regard constitutional rights .

Shocks the conscience; Removing children from a loving mother and giving a sexual predator access to them without due process offends the common conscience.

Right to make full answer and defence: The mother was not allowed a credible expert witness that had important information to give to the court. Mother was not allowed to cite case law supporting her position for the children to remain with her.

2. Section 8: Everyone has the right to be secure against unreasonable search and seizure. The children were taken by force at the home of Ashley Smith where the children resided without evidence or clear allegation of harm by Ashley Smith.
3. Section 11: Any person charged with an offence has the right to:
  - a. to be informed without unreasonable delay of the specific offence.  
To date no such specific offence has been identified.
  - b. to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal.  
All the court proceedings were closed and no public was allowed to attend. Judge Seagram started when he made his ruling on November 5, 2018 to uphold the apprehension and believed evidence would be provided to the court. This acknowledges that no evidence of harm was given and in fact no specific reference to harm was given at this hearing. When I Ashley Smith stated to the Judge Seagram that he was removing her children from her with no evidence that she harmed her children Judge Seagram answered: "I believe the Ministry will provide evidence at the protection hearing".

4. Section 12: The right not to be subject to any cruel and unusual treatment or punishment. For the mother the it is extremely cruel to have your children arbitrarily taken from her care and placed with someone she is convinced is sexually abusing them. This is extremely traumatizing. And for the children the trauma caused by the loss of contact with their mother and the cruelty of sexual abuse is obvious.

**The following is the legal basis for the constitutional question:**

- 1 Section 91.27 set out exclusive jurisdiction of the Federal Government for protection of the public. Section 91(27) is by and large the broadest of the enumerated powers allocated to the federal government. As noted by Estey J. in *Scowby v. Glendinning*:
  - “ 11. ...The terms of s. 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term. Provincial legislation which in pith and substance falls inside the perimeter of that term broadly defined is *ultra vires*. Parliament's legislative jurisdiction properly founded on s. 91(27) may have a destructive force on encroaching legislation from provincial legislatures, but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution. Here we are not concerned with the result in law of the exercise by Parliament of one of its exclusive heads of jurisdiction. Indeed, the converse is the question: what, if anything, is the result in law of legislation by a province where it may be classified as essentially criminal in nature? Basic principles require the conclusion that such legislation is invalid, regardless of any perceived need for its substantive provisions, and regardless of perceived defects or gaps in the federal legislative plan...”
2. The Federal legislative provision for the protection of the public is the Criminal Code of Canada.
3. The Superior Court of British Columbia Criminal has *Parens patriae* jurisdiction necessary to make an order of protection for children.
4. Division 4 is used in British Columbia by the Ministry of Child and Family Development and the Family Court with a purpose of protecting children from abuse or neglect. Abuse and neglect can be shown to be criminal in

nature therefore, Division 4 is outside the provisions of 91.27 which gives the federal government exclusive jurisdiction over criminal law. Therefore has no effect or force of law because it does not comply with the Constitution of Canada as required by section 52(1). The modern interpretation was articulated by Rand J. in the *Margarine Reference* where the Court stated:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. The effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interests threatened...

...Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by the law...

Therefore, the following must be met for a law to be criminal in nature:

- a) it must consist of a prohibition
- b) it must impose a penalty
- c) the law must be directed towards a public purpose...

5. Family Court does not have *Parens patriae* jurisdiction necessary to make an order of protection for a child. Family Court have provincial statute authority which is a limited authority to make child protection orders. Their orders under their enabling act are made outside the provisions of the Constitution and violate legal rights in the Charter of Rights and Freedoms and therefore consequently violates the families constitutionally guaranteed rights and freedoms.
6. The British Columbia Ministry of Child and family service development has the authority to investigate reports of child abuse and neglect and remove a child from parents or other custodians with or without a warrant, by force with or without police presence. This authority is established under provincial legislation. These duties are created outside the provisions of 91.27 which gives exclusive jurisdiction for child protection to the Federal Government. The statutes giving this power do not require adherence to the Charter of Rights and Freedoms.
7. Police failed to investigate her complaint and the Provincial Family Court removed her children from her without evidence and placed them with

Andrew English, the person accused of severely sexually abusing them while in his care.

8. By neglecting to exercise the Federal Government's duty to protect children under section 91(27) criminal code all the applicants legal charter rights were violated under the provincial Ministry of Child and Family Development and the Family Court process. LIST....rights
9. The Federal Court has authority under section 24(1) to fashion a remedy for the harm done by these constitutional right violations.
10. And the Federal Court also has *Parens patriae* which gives it jurisdiction to fashion a remedy of protection in this matter of Constitutional Challenge.

## REMEDY

11. As remedy under the authority of section 24(1) and 52 of the Constitution Act and Parens patriae jurisdiction an order to ensure the immediate protection of her children the applicant asks this Federal Court to:
  - a. A permanent order for the immediate return of the applicants children David Smith and James Smith to the biological mother Ashley Smith.
  - b. Order for the immediate initiation of a police investigation from a police jurisdiction outside Nelson BC.
  - c. A permanent order prohibiting the father from having any access, direct or indirect, to the children; and (3) a permanent order restraining the father from having any contact with the mother and the children, with a police protection clause.
  - d. Order for a financial award to cover the cost of trauma therapy for the applicant and her 2 children. The children need intensive therapy to try and repair the psychological damage caused by the sexual interference including anal penetration of them as infants.
  - e. An order under section 52 (1) of the Constitutional Act of Canada to strike down Division 4 of the provincial Child and Family Development Act of British Columbia which contravenes section 91.27 of the Constitution Act of Canada and consequently section 7-11 legal rights protected under the Charter of Rights and Freedoms. The Federal Government has exclusive jurisdiction for child protection under section 91.27 and has established the Criminal Code of Canada (CCC) to exercise this constitutional obligation. The CCC has entrenched all the constitutionally protected legal rights.

Ashley Smith



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